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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 390

THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
Petitioners,

—v.—

PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

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July, 1966

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Constitutional Provision Involved	3
Statement	3
Reasons for Granting the Writ	8
Conclusion	15

APPENDICES:

Appendix A —Revised Opinion and Judgment of Indiana Supreme Court, May 19, 1966	1a
Appendix A-1—Order Accompanying Revised Opinion and Judgment, May 19, 1966	15a
Appendix B —Original Opinion and Judgment of Indiana Supreme Court, March 8, 1966	17a
Appendix C —Petition for Rehearing Filed by Appellees [Petitioners in this Court] in the Supreme Court of Indiana, March 25, 1966	29a

CITATIONS

CASES:

Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 11
Board of Comm'rs v. Lucas, 93 U.S. 108 (1876) 3, 9, 14

Page

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 7, 8
Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co., 382 U.S. 423 (1966) 4, 5, 6, 10, 12, 13, 14

Cole v. Arkansas, 333 U.S. 196 (1948) 9

Department of Insurance v. Motors Insurance Corp., 236 Ind. 1, 138 N.E.2d 157 (1956) 13
DuBeau v. Smither and Mayton, Inc., 203 F.2d 395 (D.C. Cir. 1953) 11

Great Northern R. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358 (1932) 7
Greene v. McElroy, 360 U.S. 474 (1959) 11

Iowa-Des Moines Nat'l Bank v. Bennett, 284 U.S. 239 (1931) 11

Morey v. Doud, 354 U.S. 457 (1957) 11

NAACP v. Alabama, 357 U.S. 449 (1958) 9
Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) 10

Pavaroff v. Pavaroff, 130 P.2d 212 (Cal. App. 1942) 11
Pettigrew v. National Accounts System, Inc., 213 N.E. 2d 778 (Ill. 1966) 8

Saunders v. Shaw, 244 U.S. 317 (1917) 8
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 11

The Ottawa, 3 Wall. 268 (1866) 11
Tinder v. Clarke Auto Co., 238 Ind. 302, 149 N.E.2d 808 (1958) 13

Weis v. Cox, 205 Ind. 43, 185 N.E. 631 (1933) 14

Page

STATUTES AND CONSTITUTIONAL PROVISIONS:

U. S. Constitution, Article I, Section 8, Clause 3 .....4, 12

U. S. Constitution, Amendment XIV, Section 1 ....3, 4, 6, 7, 8, 9, 10, 11, 12

Public Law 88-108, 77 Stat. 132 (1963) 4, 13

28 U.S.C. § 1257(3) 3

Indiana Acts 1937, c. 58, §§ 1-13, Indiana Stat. §§ 55-1326 to 55-1338 .....3, 5, 6, 10

MISCELLANEOUS:

Note, 74 Harv. L. Rev. 1375 (1961) 9

Stern & Gressman, Supreme Court Practice (3d ed. 1962) 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioners, The New York Central Railroad Company, The Pennsylvania Railroad Company, The Baltimore and Ohio Railroad Company, The New York, Chicago and St. Louis Railroad Company, Monon Railroad, Erie-Lackawanna Railroad Company, Elgin, Joliet and Eastern Railroad Company, Louisville and Nashville Railroad Company, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Grand Trunk Western Railroad Company, The Chesapeake and Ohio Railroad Company, Chicago & Eastern Illinois Railroad Company, Southern Railway Company, Illinois Central Railway Company, Central Indiana Railway Company, and The Peoria and Eastern Railway Company, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Indiana entered in the above-captioned case on May 19, 1966.

OPINIONS BELOW

The trial court entered no written opinion. The revised opinion and judgment of the Supreme Court of Indiana, dated May 19, 1966, printed herein at pp. 1a-14a as Appendix A, is reported at 216 N.E.2d 716. The order accompanying the revision is printed herein as Appendix A-1, at pp. 15a-16a. The original opinion and judgment of the Supreme Court of Indiana, dated March 8, 1966, is printed herein at pp. 17a-28a as Appendix B.

JURISDICTION

The Supreme Court of Indiana issued its original opinion and judgment on March 8, 1966. A timely Petition for Rehearing, printed herein at pp. 29a-33a as Appendix C, was filed on March 25, 1966.[1] On May 5, 1966, the Petition for Rehearing was denied without opinion by docket entry. This Petition for Certiorari is filed within 90 days of that denial. On May 19, 1966, upon a Petition for Reconsideration, the Supreme Court of Indiana amended its opinion to make clear that a final judgment had been entered as follows:

> "The judgment and decree of the Superior Court of Marion County, Room 3, is reversed, the temporary injunction vacated, this cause is remanded and the court is directed to enter final judgment therein denying plaintiffs below the relief sought all at the costs of plaintiffs below . . . ." (Appendix A, p. 13a)

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[1] For the reasons indicated below, pp. 4-7, the specific federal question now presented by this Petition for Certiorari was, necessarily, first raised in the Petition for Rehearing.

Accordingly, it is unquestionable that a final judgment subject to review by this Court has been entered. *Board of Comm'rs* v. *Lucas*, 93 U.S. 108 (1876).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether a state appellate court can, consistent with the due process requirements of the Fourteenth Amendment, deny a trial of federal constitutional issues turning on factual presentations by directing the entry of final judgment in the course of an interlocutory review of a temporary injunction.

CONSTITUTIONAL PROVISION INVOLVED

The Petitioners' claim is founded on the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which reads:

> "... [N]or shall any State deprive any person of life, liberty, or property, without due process of law ...."

STATEMENT

Petitioners brought this action on May 13, 1964, in the Superior Court of Marion County, Indiana, seeking a temporary injunction and a permanent injunction to enjoin the Public Service Commission of Indiana and appropriate state officials from enforcing the Indiana Full Crew Law[2] against Petitioners. That law, enacted in 1937, generally

[2] Indiana Acts 1937, c. 58, §§ 1-13, Indiana Stat. §§ 55-1326 to 55-1338.

requires that a fireman be employed on every diesel locomotive in Indiana, that every freight train of less than seventy cars carry five crew members, and that an extra crewman (a third brakeman) be added to this complement on every train of seventy cars or more.

The Petitioners contended[3] that the Indiana Full Crew Law constituted both an impermissible burden on, and an unlawful and unconstitutional discrimination against, interstate commerce, both in violation of the Commerce Clause of the Federal Constitution; that the statute substantively violated the Due Process Clause of the Fourteenth Amendment; that it violated the Equal Protection Clause of the Fourteenth Amendment; and—a contention later rejected by this Court in the Arkansas full crew case, *Brotherhood of Locomotive Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966)[4]—that the statute was preempted by the compulsory arbitration law, Public Law 88-108, enacted by Congress in 1963. Four national railroad brotherhoods intervened as parties defendant, but two—the brotherhoods representing the engineers and the trainmen—later withdrew from the case.

The Superior Court, after receiving only affidavits and documentary evidence, granted a temporary injunction to Petitioners on February 3, 1965. The merits of the Petitioners' claims were not at issue, neither the defendants nor

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[3] See the allegations of the complaint recited in the Indiana Supreme Court's opinion, Appendix A, pp. 2a-3a.

[4] Contentions similar to those remaining to Petitioner were not passed upon by this Court in the Arkansas full crew case; indeed, contentions similar to these were expressly found not insubstantial and were "remanded to [the District] Court for consideration" by this Court in the Arkansas case. 382 U.S., at 438. See also *id.*, at 428.

the intervening defendants having answered the complaint. No findings of fact were requested or made and no trial occurred on the merits of the Petitioners' request for permanent relief. The defendant state officials and brotherhoods appealed the temporary injunction to the Indiana Supreme Court pursuant to an Indiana procedure permitting such interlocutory appeals.

On March 8, 1966, the Indiana Supreme Court rendered an opinion that not only dissolved the temporary injunction but undertook affirmatively and finally to uphold the statute against all the attacks raised in Petitioners' complaint under the Federal Constitution. The Supreme Court of Indiana thus entered an order permanently disposing of the entire action even though the trial court had considered only the question whether a temporary injunction should issue, and even though no trial on the merits of the plaintiffs' suit for permanent relief had been held.

The Indiana Supreme Court's opinion was rendered with two of the court's five judges not participating and with a third concurring only in the result. (Appendix B, p. 28a) The two-member majority opinion reviewed this Court's recent decision in *Brotherhood of Locomotive Engineers* and held—without analysis of the various points urged by Petitioners and remaining open despite this Court's decision in *Brotherhood of Locomotive Engineers*—that because the present Full Crew Law and an earlier version had already been held constitutional on two occasions and because of the presumption of constitutionality, the statute's constitutionality was beyond challenge. (Appendix B, pp. 24a-26a; see Appendix A, pp. 8a-10a) The Indiana Supreme Court did not discuss individually the separate federal constitutional points urged by Petitioners against the

Full Crew Law.[5] Nor did it offer any explanation of the reasons why it believed it had the power to render a final judgment holding the Act constitutional on an appeal from a grant of a temporary injunction and in the absence of the plenary development of facts by oral testimony, cross-examination, and findings that would have taken place upon a trial looking toward the issuance of a permanent injunction.

On March 25, 1966, Petitioners submitted a timely Petition for Rehearing which, among other points, urged that the denial of a trial on the merits of permanent relief was inconsistent with the due process requirements of the Fourteenth Amendment. This Petition for Rehearing for the first time raised the federal question now tendered to this Court—the conflict between the procedural due process requirements of the Fourteenth Amendment and the Indiana Supreme Court's action in foreclosing any trial on the merits of the case. The question was presented in the following language:

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[5] The court simply cited this Court's decision in *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423 (1966) (which was announced while this case was pending before the Indiana Supreme Court), and stated that it held that the compulsory arbitration law and the Award thereunder did not invalidate state full crew laws, and that the Arkansas full crew laws had not been shown to constitute an impermissible discrimination against interstate commerce by reason of their nonapplication to railroads of less than a defined mileage. The claims of unconstitutional burden on interstate commerce, of substantive violation of the Due Process Clause, and under the Equal Protection Clause were not discussed by the State Supreme Court; nor did it even attempt to show how this Court's discussion of the discrimination against interstate commerce point in the Arkansas case—which had been based on the specific peculiarities of the Arkansas statute and of the mileages of the railroads operating in Arkansas (see 382 U.S., at 437)—applied to the situation in Indiana. (Appendix B, pp. 23a-26a; see Appendix A, pp. 7a-10a)

"... The appellees [petitioners in this Court] are entitled to a trial on the merits of this case, and any denial of that right would not only constitute error under Indiana procedural law, but also would deprive the appellees of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States...." (Appendix C, p. 32a)

Since the question presented concerns an issue created for the first time by the decision and opinion of the Indiana Supreme Court, the question was timely and properly raised below by its inclusion in a Petition for Rehearing of that decision. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930); Stern & Gressman, *Supreme Court Practice* (3d ed. 1962), p. 99.

On May 5, 1966, the Petition for Rehearing was denied without opinion and without express reference to the procedural due process question which had been timely presented in the Petition for Rehearing. The Petitioners filed a Petition for Reconsideration. On May 19, 1966, while again not discussing the claim that its action in foreclosing a trial on the merits violated the Fourteenth Amendment, the Supreme Court of Indiana, by amendment to its opinion, made it perfectly clear that the lawsuit was terminated and that Petitioners would not be allowed a trial on the merits.[6] The Judge who had originally concurred in the

[6] The two-judge majority opinion declared:

"The facts and determination heretofore and here stated, bar appellees from taking any further action in the court below and leaves the trial court with no jurisdiction or authority to grant the relief there prayed for and deprives it of any further jurisdiction to do anything other than make the entry required therein by this opinion." (Appendix A, p. 12a)

result filed a separate opinion, dissenting from the entry of final judgment, and stating that "the appellant[7] should not be barred from having a trial on the merits of the main action, which is still pending in the trial court, as provided by the mandate in the majority opinion in this case." (Appendix A, p. 14a)

REASONS FOR GRANTING THE WRIT

1. The action of the Supreme Court of Indiana in directing that final judgment be entered on an interlocutory appeal from the grant of a temporary injunction is in conflict with the applicable decisions of this Court and the decisions of the highest courts of other states delineating the basic elements of a full and fair hearing necessary to due process of law.

This Court has recognized that a state appellate court denies a litigant due process of law in violation of the Fourteenth Amendment to the Constitution if it attempts to deny the litigant a trial on the merits of a federal constitutional claim. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673 (1930); *Saunders* v. *Shaw,* 244 U.S. 317 (1917). And the Supreme Court of Illinois has held that a trial court's conversion, without advance notice, of a hearing on a temporary injunction into a trial on the merits violates the elementary requirement of notice essential to due process. *Pettigrew* v. *National Accounts System, Inc.,* 213 N.E.2d 778 (Ill. 1966). *A fortiori,* the conversion of a preliminary proceeding into a trial on the merits of permanent injunctive relief, *retroactively* effected by an appellate court on review of a trial court's preliminary order, denies the parties the requisite notice of the

[7] Presumably a misprint for "appellees."

import of the hearing in the trial court, and violates the Due Process Clause.

Petitioners' position is simple: the retroactive conversion of a preliminary proceeding into a full trial on the merits is not simply a dubious state procedural practice. By denying the parties advance notice of the gravity and finality of that proceeding, this retroactive conversion denies them due process of law. In legal principle, this case is, we urge, governed by an application of the rule that the state may not cause legal issues to be framed in one manner in the trial court, and then prejudicially change the issues on appeal—as, for example, by trying a defendant on one charge and affirming on appeal his conviction on another, a practice which this Court has held to violate the Due Process Clause. *Cole* v. *Arkansas,* 333 U.S. 196 (1948). *Cf. NAACP* v. *Alabama,* 357 U.S. 449 (1958); Note, 74 Harv. L. Rev. 1375, 1387-88 (1961).[8]

To be sure, a state court might enter final judgment on appeal from a temporary injunction if the merits of the case turn only on propositions of law in the context of undisputed facts. *Board of Comm'rs* v. *Lucas,* 93 U.S. 108 (1876). But this is not such a case. The substantive issues Petitioners sought to present to the state courts are

[8] Thus, the question whether a temporary injunction should have issued involved, besides a preliminary development of the merits, an extensive development of the effect of interlocutory relief upon the status quo and of the various other equitable factors which are traditionally weighed by a court of equity in considering whether to issue a temporary injunction; these issues are, however, irrelevant to a permanent injunction. It was in this procedural setting and to this end that the parties developed their presentations (which were admittedly bulky) through the submission of written proofs, by affidavits and appended exhibits, on the application for a temporary injunction. Indeed, the state supreme court's opinion reflects the importance of the issues as to temporary relief to the case developed below (Appendix B, pp. 26a-28a), but nonetheless proceeds to change the issues on appeal.

in most respects similar to those that are now before the District Court for the Western District of Arkansas on remand from this Court in the *Brotherhood of Locomotive Engineers* case. These are the very questions that this Court did not consider in the abstract on that appeal, and which presented "factual issues calling for the introduction and determination of evidence." 382 U.S., at 427. These issues turn essentially on the development of factual proofs regarding the nature and extent of the changed circumstances achieved through the technological developments of modern railroading since the enactment of the Indiana Full Crew Law. The impact of these changes upon the role of the various engine and train crew employees is vital to any assessment of the statute's validity. Petitioners' action did not turn on abstract questions of law and could not constitutionally be decided in a vacuum.

Accordingly, the State Supreme Court's action would have violated the Due Process Clause even had simply state-created property rights been at issue. But the violation of the Due Process Clause was aggravated by the fact that the underlying rights sought to be vindicated by the Petitioners were federal constitutional rights. When a litigant asserts that changed circumstances since the passage of a statute have rendered its continued enforcement against him unconstitutional, the state courts are obliged to consider the evidence bearing on those circumstances. *Nashville, C. & St. L. Ry.* v. *Walters,* 294 U.S. 405 (1935). If due process was denied in *Walters* when evidence of changed circumstances was ignored, then surely due process has been denied to the Petitioners by the denial of the very trial at which they would adduce their evidence of changed circumstances.

It was essential to the presentation of Petitioners' suit to vindicate their federal constitutional rights that the full-

est possible evidentiary record be assembled, tested by cross-examination, and winnowed by findings at the trial in connection with the question of the issuance of a permanent injunction. Thus, the decisions of this Court teach that the development of an evidentiary record which reveals the details of the burden on interstate commerce is generally essential to an adjudication of the question whether an improper and unconstitutional burden exists. See, *e.g.*, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945); *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520, 528 (1959). A similar full development of the factual record has been the order in cases of challenge to state statutes under the Fourteenth Amendment's Due Process and Equal Protection Clauses. See, *e.g.*, *Morey* v. *Doud*, 354 U.S. 457 (1957). In precluding a full development of the facts, the Indiana Supreme Court refused to furnish proper procedures for the due adjudication of federal rights while at the same time proceeding to render a judgment adverse to those rights. This it may not do. *Cf. Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239 (1931).

It may be questioned whether a state could constitutionally provide such a truncated procedure—without confrontation of witnesses or rights of cross-examination—for the determination of federal constitutional issues turning on factual development even if that procedure were prescribed in advance by statute or decisional law. See *The Ottawa*, 3 Wall. 268 (1866); *Du Beau* v. *Smither and Moyton, Inc.*, 203 F.2d 395 (D.C. Cir. 1953); *Pavaroff* v. *Pavaroff*, 130 P.2d 212 (Cal. App. 1942); *cf. Greene* v. *McElroy*, 360 U.S. 474, 497 (1959). But surely a state cannot advise the parties *after the fact* that this abbreviated hearing was all the trial they are to receive on issues requiring plenary development of the pertinent facts.

2. This case is certainly of a significance indicating the need for review on certiorari. A state appellate court action denying the parties a trial on the merits of their claim obviously presents a federal constitutional issue of substance. Where the underlying claim involves federal constitutional rights, the need for this Court's intervention as arbiter of the federal system becomes even more acute; and the significance of those federal claims here increases the seriousness of the matter. This Court recognized in *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 428 (1966), that the challenges to state full-crew laws based on the Commerce Clause and on the Due Process and Equal Protection Clauses of the Fourteenth Amendment are not insubstantial. And the practical significance of these issues to the railroad industry is enormous. The annual cost of compliance with the Indiana statute alone has been estimated to be sixteen million dollars.[9] Several other states impose similar burdens on the industry. Thus the underlying merits of this lawsuit are undeniably of major import to the railroad industry, to the interstate transportation network it serves, and to the states still imposing full crew requirements. And, even if it were to be assumed that regardless of whether the petitioners make a compelling factual showing, the Indiana Supreme Court (despite its narrow majority) will not change its mind as to the constitutionality of the Full Crew Law, the fact remains that that court's action in precluding the development of a full record amounts to an unconstitutional clog on this Court's consideration, on review of the Indiana court's decision, of the underlying substantive questions.

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[9] See R. 262, 274, 287, 297, 308, 319, 328, 336, 344, 354, 364, 374, 394, 409, 420. (References are to the Record before the Indiana Supreme Court.)

3. It has been suggested by Respondents that Petitioners requested a final judgment by the Supreme Court of Indiana and, accordingly, waived the issue presented by this Petition.[10] But Petitioners have made no such waiver. Respondents base their claim on the following passage from page 130 of Petitioners' brief in the Supreme Court of Indiana:

> "The issue in this case involves the constitutionality of the Indiana Excess Crew Law. It is a matter of public interest to the people of the State of Indiana as well as to all the railroads operating in Indiana. Because of the importance of the issues presented, this Court should determine the constitutionality of this law now as it has done in other cases involving the appeal of a temporary injunction. *Tinder* v. *Clarke Auto Co.*, 238 Ind. 302, 149 N.E.2d 808 (1958); *Department of Insurance* v. *Motors Insurance Corp.*, 236 Ind. 1, 138 N.E.2d 157 (1956)."

This request must be judged in the context of the federal constitutional issues which were then available to Petitioners in the state courts, and of the settled Indiana practice with respect to appeals from temporary injunctions. Petitioners based the request on two grounds. First, at the time this case was briefed and argued the decision of this Court in the Arkansas full crew case had not yet been rendered.[11] Accordingly, Petitioners believed that one of their four bases of unconstitutionality (preemption by reason of Public Law 88-108 and the Arbitration Award)

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[10] This suggestion is contained in Respondents' Opposition to a Stay requested by Petitioners in this Court, pp. 8, *et seq.*

[11] The opinion in *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P.R. Co.*, 382 U.S. 423, was rendered January 31, 1966. Petitioners' brief in the Supreme Court of Indiana was filed April 21, 1965, and argument was held on June 2, 1965.

which involved no development of evidence, if accepted, would be dispositive of the case even on interlocutory appeal.[12] *Cf. Board of Comm'rs* v. *Lucas,* 93 U.S. 108 (1876). It was to this point—the preemption point—that petitioners awarded preeminence in briefing and oral argument. Second, as the two Indiana cases cited in the quoted passage demonstrate, the Indiana Supreme Court has on occasion in other circumstances rendered an opinion as to the constitutionality of a statute even though the issue is presented on interlocutory appeal. But the opinion and decision so rendered have not been final; there is merely a decision on the abbreviated record then before the court, subject to further factual development at the subsequent trial on the merits. In *Weis* v. *Cox,* 205 Ind. 43, 185 N.E. 631, 632-33 (1933), the Indiana Supreme Court explained this practice as follows:

> "But since there seems to have been a full hearing [on the motion for temporary injunction], we will consider the questions presented upon their merits, having in mind, however, that upon a final hearing there may be other or different evidence which might influence the decision of the trial court . . . ."

Petitioners asked for a determination of the constitutional issues, but they never asked for or invited a final judgment on those constitutional issues turning on questions of fact. Petitioners requested either a holding on the issue of preemption, a proposition of law not requiring factual development, or a preliminary adjudication on the three remaining bases for injunctive relief, all involving questions of fact eventually requiring a full development at

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[12] Indeed, in the Arkansas case, this Court (and the District Court whose order was being appealed from) both were able to make a final determination as to the preemption question on a summary judgment record. See 382 U.S., at 427-28.

trial. Either of those actions would have been standard in Indiana procedure and inoffensive to the requirements of procedural due process. But the action of the Supreme Court of Indiana in this case is unprecedented and has denied Petitioners their day in court in violation of the most elementary requirements of due process of law.

CONCLUSION

For the reasons stated, this Petition for a Writ of Certiorari to the Supreme Court of Indiana should be granted.

Respectfully submitted,

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APPENDIX A

Revised Opinion and Judgment of Indiana Supreme Court, May 19, 1966

IN THE
SUPREME COURT OF INDIANA
No. 30733

PUBLIC SERVICE COMMISSION OF INDIANA, MERTON STANLEY, PHILLIP L. BAYT and C. PATRICK CLANCY, individually and as members of and constituting the Public Service Commission of Indiana, L. A. DE JEAN, individually and as Director of the Railroad Department of the Public Service Commission of Indiana, JOHN J. DILLON, individually and as Attorney General of the State of Indiana, ROGER D. BRANIGIN, individually and as Governor of the State of Indiana, GEORGE B. LEE, Legislative Chairman for Indiana for the Brotherhood of Locomotive Firemen and Enginemen, THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, B. O. DRESBACH, Legislative Representative for Indiana of the Order of Railway Conductors and Brakemen, and THE ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, *Appellants,*

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, MONON RAILROAD, ERIE-LACKAWANNA RAILROAD COMPANY, ELGIN, JOLIET AND EASTERN RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILWAY COMPANY, CENTRAL INDIANA RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF MARION COUNTY,
ROOM NO. 3, HON. GLENN W. FUNK, JUDGE.

JACKSON, J.

Appellees on May 13, 1964, filed a complaint in the Superior Court of Marion County, Indiana, Room 3, seeking a temporary and permanent injunction to prevent the enforcement, by certain of the appellants therein named, of Acts 1937, ch. 58, §§1–13 (inclusive) being §§55-1326–55-1338, Burns' 1951 Replacement.

The law challenged by appellees' complaint is known as the Indiana Full Crew Law. The aforesaid complaint alleged that the Governor, the Attorney General and the Public Service Commission of Indiana are required to enforce the above mentioned law; and further alleged that said law is violative of appellees' rights under the Indiana and the United States Constitutions; said complaint further alleged that Congress by the adoption of Public Law 88-108, 77 Stat. 132, enacted August 28, 1963, preempted the field in which said law was designed to operate, and

> "For the reasons hereinbefore alleged, the application of the Indiana Excess Crew Law to the plaintiffs herein is unreasonable, arbitrary, capricious and unconstitutional in the following respects:
>
> "(a) Such law does not tend to promote or protect the public health, morals, safety or welfare of the people of the State of Indiana and is, therefore, not justified as an exercise of the police power of the State of Indiana but is an invalid and unauthorized attempt to exercise such power in violation of Article 1, Sections 1, 12 and 21, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.
>
> "(b) Such law interferes with and deprives plaintiffs of personal rights and liberty in violation of Sec-

tion 1, Article 1, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

"(c) Such law deprives plaintiffs of their business and property without just compensation and without due process of law in violation of Section 12 and 21, Article 1, of the Indiana Constitution and the Fourteenth Amendment of the Constitution of the United States.

"(d) Such law deprives plaintiffs of equal protection of the laws in violation of Article 1, Section 23, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

"(e) Such law is not a general law but is discriminatory and does not apply equally to all persons in like circumstances in violation of Section 23, Article 4, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

"(f) Such law imposes undue and unreasonable burdens on interstate and foreign commerce in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, commonly known as the 'Commerce Clause.'

"(g) Such law is contrary to and interferes with Public Law 88-108 and the binding award made pursuant thereto, and thereby violates the Commerce Clause (Article 1, Section 8, Clause 3) and the Supremacy Clause (Article 6, Section 2) of the United States Constitution."

Appellees' complaint further alleged that irreparable injury would result from the continued enforcement of

such law and prayed for a temporary injunction against the enforcement thereof.

The issues were formed, at the hearing on the temporary injunction, by appellants' affidavits, objections and arguments offered in opposition to appellees' request for temporary injunction and the affidavits and exhibits offered in support of the petition by appellees. Hearing thereon was had on September 23, 1964.

February 3, 1965, the trial court granted the temporary injunction sought by appellees. The temporary injunction, in pertinent part reads as follows:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:
>
> "1. The defendants, Public Service Commission of Indiana and Merton Stanley, Phillip L. Bayt, and C. Patrick Clancy, individually and as members of and constituting the Public Service Commission of Indiana, together with their successors in office, agents, servants, attorneys and all others in active concert with them, and each of them, are hereby until further order of this Court, jointly and severally enjoined from in any manner enforcing or threatening to enforce Chapter 58, Acts of The Indiana General Assembly for 1937 (Burns Ind. Stat. Ann., 1951 Repl., Sec. 55-1326 through-1338) and from taking any steps or relating or instituting or causing to be related or instituted any legal proceedings such as injunction, imposition of penalties or otherwise to enforce the provisions of said statute against plaintiffs, or any one of them, or their agents and employees.
>
> "2. The bond is set in the penal amount of $5,000.00, and the plaintiffs' written undertaking with surety in this amount is approved by the Court.

"3. This temporary injunction shall be effective immediately, and the Sheriff is hereby ordered immediately to serve a copy of this temporary injunction upon each of the defendants named in this order."

The appeal here under consideration was taken directly from the action of the court in granting such temporary injunction, pursuant to Acts 1921, ch. 251, §1, p. 741, §2-3218, Burns' 1946 Replacement.

March 10, 1965, appellants filed transcript and assignment of errors with the clerk of this court. The Assignment of Errors, omitting formal parts and signatures thereto, reads as follows:

"The appellants aver that there is manifest error in the interlocutory order of the Superior Court of Marion County, Room No. 3 and in the proceedings had in this cause which are prejudicial to appellants, in that:

"1. The court erred in admitting into evidence, over objections of appellants, affidavits and exhibits of appellees in support of rhetorical paragraphs 28 and 40 of their complaint, being Plaintiffs' Exhibits N and Q, as to which such paragraphs 28 and 40 the court sustained appellants' motion to strike.

"2. The court erred in admitting into evidence, over objections of appellants, all of the affidavits and exhibits of appellees allegedly in support of rhetorical paragraphs 25, 26, 33, 34, 36 and 37 of their complaint, which said paragraphs allege changed conditions since enactment of Chapter 58 of the Indiana Acts of 1937.

"3. The court erred in granting the temporary injunction requested by appellees."

Appellees' complaint contained 46 rhetorical paragraphs, the first 20 of which were concerned solely with the identification of the parties, while the remaining 26 paragraphs were purportedly directed against the constitutionality of the Full Crew Law in its entirety. It is apparent, however, that appellees' concern was clearly limited to the need for employing firemen on all trains, and extra brakemen on freight trains of seventy cars or more. Thus, the question is narrowed to a determination of whether or not the provisions of the Full Crew Law, requiring firemen on all trains and the extra brakemen on trains of 70 cars or more, are constitutional in their application to appellees.

The constitutional issues formed in the complaint are summarized in rhetorical paragraph 44 thereof. Subparagraphs (a), (b) and (c) of said paragraph charge the improvident exercise of the police power made so by the changed conditions in railroading since World War II, thus, a violation of the due process clauses of the State and Federal Constitutions was assigned; subparagraphs (d) and (e) regard the law as being violative of the equal protection clauses of said constitutions; subparagraph (f) cites the Federal Commerce clause as grounds for the laws unconstitutionality; and subparagraph (g) contends that the field covered by the Full Crew Law has been preempted by Federal Legislation and, therefore, violates the commerce and supremacy clauses of the Constitution of the United States.

While the complaint and the issues formed in the case at bar raise all the questions presented, one of the prime issues to be determined is, did the trial court abuse its discretion in granting a temporary injunction under the law and the facts of the instant case?

We take judicial notice that after the institution of this appeal the Supreme Court of the United States accepted

jurisdiction in an appeal from the U.S. District Court for the Western District of Arkansas wherein the District Court, without hearing any evidence, sustained the plaintiffs' motion for a summary judgment, holding that the Arkansas statutes are "in substantial conflict with Public Law 88-108 . . . and proceedings thereunder, and are therefore unenforceable against the plaintiffs . . . 239 F. Supp. 1, 29." The question presented under the Arkansas statutes[1] are practically identical with the Indiana Statute[2] here in controversy.

By virtue of the fact that the Federal questions presented in the Arkansas case are present in the case at bar, under a similar statute, this court withheld its decision pending a determination of the Arkansas case by the Supreme Court of the United States. That court by its opinion *Engineers* v. *Chicago, R.I. & P.R. Co.* Nos. 69 and 71, October Term, 1965, dated January 31, 1966, decided I "[i]n the face of the clear congressional history of this Act we could not hold that either the Act itself or the arbitration awards made under it supersede the Arkansas state laws." [Public Law 88-108].

In its finding No. II the Supreme Court held as follows:

> "The railroads contend that the District Court would have been justified in holding the two Arkansas Acts unconstitutional on the second ground of their motion for summary judgment which is that the Two Acts 'constitute discriminatory legislation against interstate commerce in favor of intrastate commerce.' Aside from the fact that such an argument was apparently

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rejected in the prior cases upholding the constitutionality of the Arkansas statutes we think it is wholly without merit. The argument is based on the fact that the 1907 state law exempts railroads with less than 50 miles of track and the 1913 law exempts railroads with less than 100 miles of track. None of the States' 17 intrastate railroads have more than 50 miles of track. It turns out that none of them are subject to the two state laws while 10 of the 11 interstate railroads are subject to the 1907 Act and eight of them are subject to the 1913 Act. It is impossible for us to say as a matter of law that this difference in treatment by the State, based on the differing mileage of railroads, is without any rational basis as the railroads contend. Certainly some regulations based on different mileage of railroads might be wholly rational, reasonable, and desirable. We cannot say on the record now before us that classification according to the length of mileage in these two statutes constitutes discrimination against interstate commerce in violation of the Commerce Clause or the Equal Protection Clause. See *Florida Lime Growers* v. *Paul*, 373 U.S. 132, 137."

The Supreme Court of the United States having by its opinion above cited determined that:

1. Public Law 88-108 did not supersede the Arkansas state laws, and

2. Classification according to mileage in these statutes does not constitute discrimination against interstate commerce in violation of the Commerce Clause or the Equal Protection Clause. By analogy we are of the opinion that such determination likewise, in the case at bar, has decided those questions adversely to plaintiffs below; and that we

are now confronted only with the determination of the question as to the constitutionality of the Indiana Full Crew Law (Acts 1937, ch. 58, *supra*) and whether or not the trial court abused its discretion in granting a temporary injunction under the law and the facts of the instant case.

It appears that in 1907 Indiana enacted its first Full Crew Law (Acts 1907, ch. 11). That law applied to all passenger and mail trains five cars or more in length, and to freight trains owned by companies that operated more than four freight trains in every 24 hour period. Under this act all passenger and freight trains of less than 50 cars were required to have a crew of five, consisting of an engineer, a fireman, a conductor, a brakeman and a flagman. Freight trains of more than 50 cars in length were required to have six crewmen, *i.e.*, one brakeman in addition to the other five crewmen. That act was attacked as being an invalid exercise of the police powers of the State in the case of *Pittsburgh, etc. R. Co.* v. *State* (1909), 172 Ind. 147, 87 N.E. 1034. The Act was declared to be constitutional by this court and that decision was affirmed by the United States Supreme Court in 223 U.S. 713.

Acts 1909, ch. 25, repealed the 1907 Act and enacted a new Full Crew Law which was repealed by Acts 1921, ch. 81. Indiana was without a Full Crew Act from that time until the enactment of the present Full Crew Act (Acts 1937, ch. 58, §§1-13, §§55-1326–55-1338, Burns 1951 Replacement). There was little change in the present Act from that of the 1907 Act, the principal difference in the two being that the 1907 Act required the additional brakeman on trains of 50 cars or more while the 1937 Act required the additional brakeman on trains of 70 cars or more. The 1937 Act until now has not been tested at the Appellate Court level, but it did withstand a constitutional

attack in the Marion Circuit Court wherein Special Judge Robert Lybrook sustained the demurrer of the Public Service Commission and the Brotherhoods. *Pennsylvania R.R. v. Public Service Comm.* Cause No. C0,534, decided February 26, 1963.

In view of the fact that the 1907 Act relating to the Full Crew Law withstood the test of constitutionality in the courts, at both the State and Federal levels; the further fact that the 1937 Act while not having been tested at the Appellate level in the State courts, was sustained in the trial court on the constitutional question, and that determination was not appealed from, as indicated in the preceding paragraph of this opinion, together with the rule of law that the constitutionality of an act is presumed, until overthrown by the courts, *Richmond Baking Co.* v. *Dept. of Treasury* (1939), 215 Ind. 110, 18 N.E. 2d 778, provides cogent reasons to support the Act here in controversy. Careful consideration of the issue presented on that question requires us to hold, and we so do, the Act to be constitutionally valid.

The only question now remaining to be determined in the case at bar is whether or not error was committed in granting the temporary injunction, and we now address ourselves to the consideration of that issue.

Appellants contend, properly, that to entitle appellees to the relief sought below, *i.e.* temporary injunction, it was mandatory for them to make a prima facie showing of emergency and irreparable injury. Appellants further contend that appellees were compelled to make a prima facie showing that the Full Crew Law is unconstitutional upon one of the theories advanced, and in addition, appellees had to show, prima facie, their entitlement to temporary relief as required by established equitable principles. The questions as to the constitutionality of the Act have been decided adversely to appellees.

Plaintiffs below, appellees here, incorporate in their complaint several paragraphs alleging the amount of money it is costing them to comply with the provisions of the Full Crew Law, and allege that violations thereof may impose penalties. No additional allegations of fact are made to support the need for a temporary injunction. The evidence adduced in support of these allegations clearly indicate that the changes in operating procedure began in 1937 when the change over from steam to diesel power began; at and after that date appellees urge that the changed conditions resulted in a decrease in less-than-carload lots of freight, decrease in difficulties in switching and flagging, use of longer trains and fewer stops etc. Assuming, arguendo, that these allegations are true, the fact remains that these changes have been in existence for years and appellees have been compelled to comply with the Full Crew Law since its enactment in 1937 and during the years the changes were taking place. Under the circumstances and facts delineated in the case at bar we are unable to see on what basis or theory appellees can sustain the allegations of emergency and irreparable injury set forth in the complaint; on the contrary it appears that the changes alleged and testified to in the case at bar have been in existence over such a period of time as to conclusively negate appellees' ability to show either an emergency or irreparable injury.

In arriving at a determination of the issues involved in the case at bar we take cognizance of, and accept at face value, the appellees statements that they have made great technological advancements and that the evidence revealed that these operating changes in railroading were occurring in Indiana all during the period between 1937 and the date suit was filed in the instant case and that these changes are still occurring. We point out however that

these technological advances and the changes made and *being* made occurred and are occurring by reason of necessity, to meet competition, and we observe that on the whole they have not resulted in any appreciable available increase in service to the public. In some areas and in many ways available services have declined in both quality and quantity, or have been entirely eliminated. In any event the alleged improvements in technology and operating changes cannot here be used to justify a reduction in appellees work force. Such relief, if justified, is properly found in the legislature and not the courts.

The recent decision of the United States Supreme Court, in Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co., 86 S.Ct. 594, dated January 31, 1966, *supra,* holds that the federal statute has not 'pre-empted the field covered by the subject matter of the law here challenged. The fact this [sic] this court has heretofore held, and again now holds that the "full crew law" (Acts 1937, ch. 58, §§1-13 inclusive, §§55-1326–55-1338, Burns' 1951 Replacement) is constitutional, and that we have given in this appeal consideration to the changes in condition alleged by appellees not only permits, but requires this court, in the case at bar, to enter a final judgment herein. The facts and determination heretofore and here stated, bar appellees from taking any further action in the court below and leaves the trial court with no jurisdiction or authority to grant the relief there prayed for and deprives it of any further jurisdiction to do anything other than make the entry required therein by this opinion.

This court has previously indicated the general equitable principles required before the granting of a temporary injunction,

"Generally, the purpose of an injunction pendente lite is to preserve the status quo. A temporary injunction will be granted where it appears that the case is a proper one for investigation in a court of equity. However, it ought not be awarded for a tentative purpose, but only in a case where it is shown that there is an impending injury or urgent necessity which demands the immediate interposition of a writ of injunction, although it is not essential that a case be made out which will entitle the applicant to relief at the final hearing."

16 I.L.E., Injunctions, §2, p. 4;
The Ind. Annual Conf. Corp. et al. v. *Lemon, etc.* (1956), 235 Ind. 163, 131 N.E. 2d 780;
Pub. Ser. Com. v. *Ind'p'ls. Railways* (1947), 225 Ind. 30, 72 N.E. 2d 434;
Weis v. *Cox* (1933), 205 Ind. 43, 185 N.E. 631, 632;
City of LaPorte v. *Scott* (1906), 166 Ind. 78, 76 N.E. 878, 881;
See also: 16 I.L.E., Injunctions, §96, p. 66.

The above cited authorities hold that the purpose of a temporary injunction is to preserve the status quo on the grounds of emergency and irreparable injury, and in addition thereto it must be shown that the defendants can be adequately indemnified by a bond.

In the case at bar we are compelled to conclude that the Superior Court of Marion County, Room 3, in granting the temporary injunction, abused its discretion.

The judgment and decree of the Superior Court of Marion County, Room 3, is reversed, the temporary injunction vacated, this cause is remanded and the court is directed to enter final judgment therein denying plaintiffs below the relief sought all at the costs of plaintiffs below.

The clerk of this Court is now ordered to transmit immediately, a certified copy of this opinion to the clerk of the Superior Court of Marion County, Room No. 3, and to the Circuit Court of Shelby County, Indiana, to which court the cause here appealed from has been venued.

MYERS, C.J. concurs;
ARTERBURN, J., concurs in part, with opinion
RAKESTRAW and ACHOR, JJ. not participating.

ARTERBURN, J.—Concurring in Part.

I concur in the result of the opinion on the appeal from the temporary injunction. However, I feel the appellant [sic] should not be barred from having a trial on the merits of the main action, which is still pending in the trial court, as provided by the mandate in the majority opinion in this case.

APPENDIX A-1

Order Accompanying Revised Opinion and Judgment, May 19, 1966

ORDER

[Caption Omitted]

Appellees' petition for reconsideration of our denial of their Petition for Re-hearing and their petition for stay and appellants' motion to strike "Appellees' Petition For Reconsideration and Brief in Support Thereof" and to deny "Appellees Petition For Stay" heretofore filed herein, are now considered by the court. The court having given careful attention to the above mentioned pleading now finds that appellants' motions to strike appellees said pleadings are well taken and that the same should be sustained.

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED and DECREED by the court that "Appellees' Petition for Reconsideration and Brief in Support Thereof" and "Appellees' Petition for Stay" be and they are hereby denied. It is further ordered, adjudged and decreed by the court that the prayer of appellants' motions to strike "Appellees Petition For Reconsideration and Brief in Support Thereof" and to deny "Appellees' Petition For Stay" is hereby granted.

It further having been suggested to the court that its previous opinion contains certain alleged latent ambiguities, and it being the decision of the court that if there be such ambiguities in such opinion and it being still within term and the opinion of the court thereby being in fieri the court now sua sponte, withdraws its former opinion

and in lieu thereof now substitutes for such former opinion, the opinion herewith accompanying this order and the clerk of this court is now ordered to certify forthwith to the clerk of Marion Superior Court, Room No. 3 and to the clerk of the Shelby Circuit Court the opinion accompanying this order.

Dated at Indianapolis, Indiana, this 19th day of May, 1966.

WALTER MYERS, JR.
Chief Justice

APPENDIX B

Original Opinion and Judgment of Indiana Supreme Court, March 8, 1966

IN THE
SUPREME COURT OF INDIANA
No. 30733

PUBLIC SERVICE COMMISSION OF INDIANA, MERTON STANLEY, PHILLIP L. BAYT and C. PATRICK CLANCY, individually and as members of and constituting the Public Service Commission of Indiana, L. A. DE JEAN, individually and as Director of the Railroad Department of the Public Service Commission of Indiana, JOHN J. DILLON, individually and as Attorney General of the State of Indiana, ROGER D. BRANIGIN, individually and as Governor of the State of Indiana, GEORGE B. LEE, Legislative Chairman for Indiana for the Brotherhood of Locomotive Firemen and Enginemen, THE BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, B. O. DRESBACH, Legislative Representative for Indiana of the Order of Railway Conductors and Brakemen, and THE ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, *Appellants,*

—v.—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, MONON RAILROAD, ERIE-LACKAWANNA RAILROAD COMPANY, ELGIN, JOLIET AND EASTERN RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, GRAND TRUNK WESTERN RAILROAD COMPANY, THE CHESAPEAKE AND OHIO RAILROAD COMPANY, CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILWAY COMPANY, CENTRAL INDIANA RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY, *Appellees.*

APPEAL FROM THE SUPERIOR COURT OF MARION COUNTY, ROOM NO. 3, HON. GLENN W. FUNK, JUDGE.

JACKSON, J.

Appellees on May 13, 1964, filed a complaint in the Superior Court of Marion County, Indiana, Room 3, seeking a temporary and permanent injunction to prevent the enforcement, by certain of the appellants therein named, of Acts 1937, ch. 58, §§1–13 (inclusive) being §§55-1326–55-1338, Burns' 1951 Replacement.

The law challenged by appellees' complaint is known as the Indiana Full Crew Law. The aforesaid complaint alleged that the Governor, the Attorney General and the Public Service Commission of Indiana are required to enforce the above mentioned law; and further alleged that said law is violative of appellees' rights under the Indiana and the United States Constitutions; said complaint further alleged that Congress by the adoption of Public Law 88-108, 77 Stat. 132, enacted August 28, 1963, preempted the field in which said law was designed to operate, and

"For the reasons hereinbefore alleged, the application of the Indiana Excess Crew Law to the plaintiffs herein is unreasonable, arbitrary, capricious and unconstitutional in the following respects:

"(a) Such law does not tend to promote or protect the public health, morals, safety or welfare of the people of the State of Indiana and is, therefore, not justified as an exercise of the police power of the State of Indiana but is an invalid and unauthorized attempt to exercise such power in violation of Article 1, Sections 1, 12 and 21, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

"(b) Such law interferes with and deprives plaintiffs of personal rights and liberty in violation of Section 1, Article 1, of the Indiana Constitution and the

Fourteenth Amendment to the Constitution of the United States.

"(c) Such law deprives plaintiffs of their business and property without just compensation and without due process of law in violation of Section 12 and 21, Article 1, of the Indiana Constitution and the Fourteenth Amendment of the Constitution of the United States.

"(d) Such law deprives plaintiffs of equal protection of the laws in violation of Article 1, Section 23, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

"(e) Such law is not a general law but is discriminatory and does not apply equally to all persons in like circumstances in violation of Section 23, Article 4, of the Indiana Constitution and the Fourteenth Amendment to the Constitution of the United States.

"(f) Such law imposes undue and unreasonable burdens on interstate and foreign commerce in violation of Article 1, Section 8, Clause 3, of the Constitution of the United States, commonly known as the 'Commerce Clause.'

"(g) Such law is contrary to and interferes with Public Law 88-108 and the binding award made pursuant thereto, and thereby violates the Commerce Clause (Article 1, Section 8, Clause 3) and the Supremacy Clause (Article 6, Section 2) of the United States Constitution."

Appellees' complaint further alleged that irreparable injury would result from the continued enforcement of such law and prayed for a temporary injunction against the enforcement thereof.

The issues were formed, at the hearing on the temporary injunction, by appellants' affidavits, objections and arguments offered in opposition to appellees' request for temporary injunction and the affidavits and exhibits offered in support of the petition by appellees. Hearing thereon was had on September 23, 1964.

February 3, 1965, the trial court granted the temporary injunction sought by appellees. The temporary injunction, in pertinent part reads as follows:

"IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by the Court as follows:

"1. The defendants, Public Service Commission of Indiana and Merton Stanley, Phillip L. Bayt, and C. Patrick Clancy, individually and as members of and constituting the Public Service Commission of Indiana, together with their successors in office, agents, servants, attorneys and all others in active concert with them, and each of them, are hereby until further order of this Court, jointly and severally enjoined from in any manner enforcing or threatening to enforce Chapter 58, Acts of The Indiana General Assembly for 1937 (Burns Ind. Stat. Ann., 1951 Repl., Sec. 55-1326 through-1338) and from taking any steps or relating or instituting or causing to be related or instituted any legal proceedings such as injunction, imposition of penalties or otherwise to enforce the provisions of said statute against plaintiffs, or any one of them, or their agents and employees.

"2. The bond is set in the penal amount of $5,000.00, and the plaintiffs' written undertaking with surety in this amount is approved by the Court.

"3. This temporary injunction shall be effective immediately, and the Sheriff is hereby ordered immedi-

ately to serve a copy of this temporary injunction upon each of the defendants named in this order."

The appeal here under consideration was taken directly from the action of the court in granting such temporary injunction, pursuant to Acts 1921, ch. 251, §1, p. 741, §2-3218, Burns' 1946 Replacement.

March 10, 1965, appellants filed transcript and assignment of errors with the clerk of this court. The Assignment of Errors, omitting formal parts and signatures thereto, reads as follows:

"The appellants aver that there is manifest error in the interlocutory order of the Superior Court of Marion County, Room No. 3 and in the proceedings had in this cause which are prejudicial to appellants, in that:

"1. The court erred in admitting into evidence, over objections of appellants, affidavits and exhibits of appellees in support of rhetorical paragraphs 28 and 40 of their complaint, being Plaintiffs' Exhibits N and Q, as to which such paragraphs 28 and 40 the court sustained appellants' motion to strike.

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"3. The court erred in granting the temporary injunction requested by appellees."

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While the complaint and the issues formed in the case at bar raise all the questions presented, one of the prime issues to be determined is, did the trial court abuse its discretion in granting a temporary injunction under the law and the facts of the instant case?

We take judicial notice that after the institution of this appeal the Supreme Court of the United States accepted jurisdiction in an appeal from the U.S. District Court for the Western District of Arkansas wherein the District

Court, without hearing any evidence, sustained the plaintiffs' motion for a summary judgment, holding that the Arkansas statutes are "in substantial conflict with Public Law 88-108 . . . and proceedings thereunder, and are therefore unenforceable against the plaintiffs . . . 239 F. Supp. 1, 29." The question presented under the Arkansas statutes[1] are practically identical with the Indiana Statute[2] here in controversy.

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> "The railroads contend that the District Court would have been justified in holding the two Arkansas Acts unconstitutional on the second ground of their motion for summary judgment which is that the Two Acts 'constitute discriminatory legislation against interstate commerce in favor of intrastate commerce.' Aside from the fact that such an argument was apparently rejected in the prior cases upholding the constitutionality of the Arkansas statutes we think it is wholly

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without merit. The argument is based on the fact that the 1907 state law exempts railroads with less than 50 miles of track and the 1913 law exempts railroads with less than 100 miles of track. None of the States' 17 intrastate railroads have more than 50 miles of track. It turns out that none of them are subject to the two state laws while 10 of the 11 interstate railroads are subject to the 1907 Act and eight of them are subject to the 1913 Act. It is impossible for us to say as a matter of law that this difference in treatment by the State, based on the differing mileage of railroads, is without any rational basis as the railroads contend. Certainly some regulations based on different mileage of railroads might be wholly rational, reasonable, and desirable. We cannot say on the record now before us that classification according to the length of mileage in these two statutes constitutes discrimination against interstate commerce in violation of the Commerce Clause or the Equal Protection Clause. See *Florida Lime Growers* v. *Paul*, 373 U.S. 132, 137."

The Supreme Court of the United States having by its opinion above cited determined that:

1. Public Law 88-108 did not supersede the Arkansas state laws, and

2. Classification according to mileage in these statutes does not constitute discrimination against interstate commerce in violation of the Commerce Clause or the Equal Protection Clause. By analogy we are of the opinion that such determination likewise, in the case at bar, has decided those questions adversely to plaintiffs below; and that we are now confronted only with the determination of the question as to the constitutionality of the Indiana Full

Crew Law (Acts 1937, ch. 58, *supra*) and whether or not the trial court abused its discretion in granting a temporary injunction under the law and the facts of the instant case.

It appears that in 1907 Indiana enacted its first Full Crew Law (Acts 1907, ch. 11). That law applied to all passenger and mail trains five cars or more in length, and to freight trains owned by companies that operated more than four freight trains in every 24 hour period. Under this act all passenger and freight trains of less than 50 cars were required to have a crew of five, consisting of an engineer, a fireman, a conductor, a brakeman and a flagman. Freight trains of more than 50 cars in length were required to have six crewmen, *i.e.*, one brakeman in addition to the other five crewmen. That act was attacked as being an invalid exercise of the police powers of the State in the case of *Pittsburgh, etc. R. Co.* v. *State* (1909), 172 Ind. 147, 87 N.E. 1034. The Act was declared to be constitutional by this court and that decision was affirmed by the United States Supreme Court in 223 U.S. 713.

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The only question now remaining to be determined in the case at bar is whether or not error was committed in granting the temporary injunction, and we now address ourselves to the consideration of that issue.

Appellants contend, properly, that to entitle appellees to the relief sought below, *i.e.* temporary injunction, it was mandatory for them to make a prima facie showing of emergency and irreparable injury. Appellants further contend that appellees were compelled to make a prima facie showing that the Full Crew Law is unconstitutional upon one of the theories advanced, and in addition, appellees had to show, prima facie, their entitlement to temporary relief as required by established equitable principles. The questions as to the constitutionality of the Act have been decided adversely to appellees.

Plaintiffs below, appellees here, incorporate in their complaint several paragraphs alleging the amount of money it is costing them to comply with the provisions of the Full Crew Law, and allege that violations thereof may impose penalties. No additional allegations of fact are made to support the need for a temporary injunction. The evidence adduced in support of these allegations clearly indicate that the changes in operating procedure began in 1937 when the change over from steam to diesel power began; at and after that date appellees urge that the changed conditions resulted in a decrease in less-than-carload lots of freight, decrease in difficulties in switching and flagging, use of longer trains and fewer stops etc. Assuming, arguendo, that these allegations are true, the fact remains that these changes have been in existence for years and appellees have been compelled to comply with the Full Crew Law since its enactment in 1937 and during the years the changes were taking place. Under the circumstances and facts delineated in the case at bar we are unable to see on what basis or theory appellees can sustain the allegations of emergency and irreparable injury set forth in the complaint; on the contrary it appears that the changes alleged and testified to in the case at bar have been in existence over such a period of time as to conclusively negate appellees' ability to show either an emergency or irreparable injury.

This court has previously indicated the general equitable principles required before the granting of a temporary injunction,

> "Generally, the purpose of an injunction pendente lite is to preserve the status quo. A temporary injunction will be granted where it appears that the case is a proper one for investigation in a court of equity. However, it ought not be awarded for a tentative pur-

pose, but only in a case where it is shown that there is an impending injury or urgent necessity which demands the immediate interposition of a writ of injunction, although it is not essential that a case be made out which will entitle the applicant to relief at the final hearing."

16 I.L.E., Injunctions, §2, p. 4;

The Ind. Annual Conf. Corp. et al. v. *Lemon, etc.* (1956), 235 Ind. 163, 131 N.E. 2d 780;

Pub. Ser. Com. v. *Ind'p'ls. Railways* (1947), 225 Ind. 30, 72 N.E. 2d 434;

Weis v. *Cox* (1933), 205 Ind. 43, 185 N.E. 631, 632;
City of LaPorte v. *Scott* (1906), 166 Ind. 78, 76 N.E. 878, 881;

See also: 16 I.L.E., Injunctions §96, p. 66.

The above cited authorities hold that the purpose of a temporary injunction is to preserve the status quo on the grounds of emergency and irreparable injury, and in addition thereto it must be shown that the defendants can be adequately indemnified by a bond.

In the case at bar we are compelled to conclude that the Superior Court of Marion County, Room 3, in granting the temporary injunction, abused its discretion.

The judgment and decree of the Superior Court of Marion County, Room 3, is reversed, the temporary injunction vacated, this cause is remanded the court is directed to enter judgment therein according to the tenor of this opinion at the costs of plaintiffs below.

MYERS, C.J. concurs,
ARTERBURN, J. concurs in result
RAKESTRAW and ACHOR, JJ. not participating

APPENDIX C

Petition for Rehearing Filed by Appellees [Petitioners in this Court] in the Supreme Court of Indiana, March 25, 1966

[Caption Omitted]

APPELLEES' PETITION FOR REHEARING

Appellees, 16 railroads, respectfully but most urgently petition this Court for a rehearing of this cause and strongly urge that the Court erred in its opinion and decision in the following respects:

1. In holding on page 10 of their opinion that this Court is required to hold the present statute constitutional because of three reasons: (1) this Court's 57-year-old decision in *Pittsburgh C., C. & St.L. Ry.* v. *State* (1909), 172 Ind. 147, 87 N.E. 1034, construing a previous statute; (2) Judge Lybrook's unreported nisi prius decision sustaining a demurrer to a complaint by a single railroad attacking the present statute's requirement of an extra brakeman on one seven-mile section of an interlocking plant; and (3) the presumption of constitutionality. In fact, these reasons do not provide a valid basis for a decision in 1966 on the broad issues present in this case. Since they ignore all evidence of changed operating conditions in railroading, they are insufficient for this Court's decision under the law as established by the United States Supreme Court in *Nashville, C. & St.L. Ry.* v. *Walters* (1935), 294 U.S. 405, 55 Sup. Ct. 486. Appellees have placed primary reliance upon the principle that a statute valid as a reasonable exercise of the police power when enacted may later become invalid because of a change in conditions that renders its effect

unreasonable and arbitrary, so that its continued enforcement constitutes a violation of the due process clauses of the Indiana and United States Constitutions. In ignoring the virtually uncontradicted evidence revealed by the record respecting the mechanical and electronic revolution occurring in modern railroading, this Court has ignored the law of the land and has failed to come to grips with the heart of appellees' position.

2. In stating on page 9 of the Court's opinion that the determination of the United States Supreme Court in *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P. R.R.* (decided January 31, 1966), 86 Sup. Ct. 594, has decided the alleged violations of appellees' rights under the commerce clause of the United States Constitution and the equal protection clauses of the Indiana and of the United States Constitutions adversely to appellees. In point of fact, both the issues and the posture of the cases differ substantially. No issue in the instant case except federal preemption is finally decided by *Engineers* v. *Chicago*. The other issues in that case were remanded to the lower court with specific instructions that they be determined by the Court following the introduction of evidence at a hearing.

3. In stating on page 6 of the Court's opinion that appellees' concern (and their constitutional challenge) was limited to the need for employing firemen on all trains, and extra brakemen on freight trains of 70 cars or more. In fact, as the special boards of adjustment have recognized and as operating experience has shown, even the second brakeman is frequently unnecessary. Appellees have made the broad challenge that the statute's inflexibility in the face of the infinite variety railroading entails under modern operating conditions constitutes an unreasonable exercise of this state's police powers as applied to them in

the present day. This deprives them of due process of law; constitutes an undue and discriminatory burden on interstate commence; and denies railroads the equal protection of the laws, all in violation of the Constitutions of Indiana and the United States.

4. In stating on page 12 of their opinion that appellees' allegations of emergency and irreparable injury were not sustained by the evidence since the changes that made the statute unreasonable had been in existence for years. In fact, the evidence revealed that these operating changes in railroading were occurring in Indiana all during the period between 1937 and the date suit was filed in the instant case, and that these changes are *still occurring*. They are not a static thing, completed years ago. The evidence also revealed that collective bargaining agreements had prevented appellees from challenging the statute until a decision of the United States Supreme Court removed this barrier on April 27, 1964. Sixteen days later the appellees filed their suit to enjoin.

5. In ignoring another of appellees' main contentions, i.e., that the Indiana Full Crew Law placed an unreasonable burden on interstate commerce in requiring a fireman and one or more extra brakemen on interstate railroad movements crossing any part of Indiana. This argument was fully discussed by appellees in their Brief (pp. 80-87, inclusive). The only way in which this statute might discriminate against and burden interstate commerce that was discussed by this Court in its opinion (at pages 7 and 8) pertained to the classification according to mileage (because the Indiana statute exempts intrastate railroads of 25 miles or less). This discussion completely ignored appellees' contention that the statutory requirement that a

fireman and one or more extra brakemen be added to the crew while the train passes through Indiana is an unreasonable burden on interstate commerce.

6. In ignoring another of appellees' main contentions, i.e., that the Indiana Full Crew Law requires a minimum crew on railroad trains but no Indiana law requires a minimum crew on other and competing means of transportation such as electric passenger trains, buses and trucks, thereby discriminating against railroads in violation of the equal protection clauses of the Federal and Indiana Constitutions. This was fully briefed in appellees' Brief at pages 68-80, inclusive.

7. In phrasing its mandate so as to permit some doubt as to its effect. The mandate might be construed to hold not only that this Court has reversed the issuance of a temporary injunction but also that the trial court has been ordered to enter final judgment for the appellants now. It is clear from the record before the Court that this Court can have held no more than that the temporary injunction was erroneously issued. That was the only issue presented to it. The appellees are entitled to a trial on the merits of this case, and any denial of that right would not only constitute error under Indiana procedural law, but also would deprive the appellees of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States and Article 1, Sections 12 and 21, of the Indiana Constitution. Accordingly, in the event this Court denies a rehearing, it should reframe its mandate so that it is clear that this case is remanded to the trial court for a full trial on the merits as to whether the statute is unconstitutional and whether a permanent injunction should be granted.

WHEREFORE, appellees respectfully request that this petition for a rehearing be granted and that the full Court hear oral argument on the merits of this case.

Respectfully submitted,

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SUPREME COURT, U.S.

No. 390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.,
Petitioners

vs.

PUBLIC SERVICE COMMISSION OF INDIANA, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENTS IN OPPOSITION

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August, 1966

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	5
Reasons for Not Granting the Writ	8
Summary of Argument	8
Argument	11
Conclusion	21

CITATIONS

Page

CASES:

Board of Commissioners, etc. v. Lucas, Treasurer (1876), 93 U.S. 108 12

Brinkerhoff-Faris Trust & Savings Co. v. Hill (1930), 281 U.S. 673 13

Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co. (1966), 382 U.S. 423 ..... 6, 21

Capella, et al. v. Zurich General Acc. Liability Insurance Co., et al. (1952), 194 F. 2nd 558 19

Chicago, Rock Island and Pacific Railroad Co. v. Hardin (1965), 239 F. Supp. 1 21

Missouri Pacific Railway Co. v. Norwood (1931), 283 U. S. 249 ..... 10, 20

Nashville, C. & St. L. Ry. v. Walters (1935), 294 U. S. 405 15

North Carolina Railroad Company v. Story, et al. (1925), 268 U.S. 288 18

CONSTITUTIONS AND STATUTES:

United States Constitution, 14th Amendment 2, 3, 19

United States Constitution, 5th Amendment 19

Burns IND. STAT. ANN., Sec. 3-2102 4

Sec. 3-2103 4

Sec. 3-2104 5

Sec. 3-2105 5

Burns IND. STAT. ANN., Secs. 55-1326 to 55-1338 6

Public Law 88-108 ..... 6, 20

RULES:

Federal Rules of Civil Procedure, Rule 56 19

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The final opinion of the Indiana Supreme Court, dated May 19, 1966, is reported in 216 N.E.2d 716 and is accurately reproduced as Appendix A of the Petition. The Order of said Court accompanying said opinion is accurately reproduced as Appendix A-1 of the Petition. A former opinion of that Court, dated March 8, 1966 and withdrawn by said Order, is accurately reproduced as Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition and Appendix C thereto is an accurate reproduction of the petitioners' "Appellees' Petition for Rehearing" as filed with the Indiana Supreme Court on March 25, 1966 which was denied on May 5, 1966.

QUESTIONS PRESENTED

Under this heading, the Petition contains but a single question which, as stated by Petitioners, reads as follows:

> "Whether a state appellate court can, consistent with the due process requirements of the Fourteenth Amendment, deny a trial of federal constitutional issues turning on factual presentations by directing the entry of final judgment in the course of an interlocutory review of a temporary injunction."

At first glance, the "Question Presented" as above stated by Petitioners, appears to be substantial. Noteworthy is the absence of any question taking issue with the substantive holding of the Indiana Supreme Court by its Opinion dated May 19, 1966. In reality, Petitioners' question is not substantial and is a uniquely narrow claim concerning Indiana procedural law. Because the "Question Presented," as stated by Petitioners, wrongly implies that the Indiana Supreme Court decided federal constitutional issues without any trial at all, Respondents feel compelled to clarify the issue sought to be presented by the Petitioners by framing the "Questions Presented" in the following language:

> 1. In injunction proceedings pending in state courts, does the due process of law clause of the

Fourteenth Amendment require that there be a *second* hearing on the issues stated in the complaint when the petitioners had one hearing at which they were afforded the opportunity without restriction to submit evidence, which resulted in a transcript of evidence containing more than 1300 pages of affidavits and exhibits?

2. In injunction proceedings pending in state courts, does the due process of law clause of the Fourteenth Amendment require that there be a *second* hearing on the issues stated in the complaint for the purpose of introducing evidence *in addition* to that which was introduced at the *first* hearing, when the petitioners *waived* the right to introduce additional evidence *by requesting that the Supreme Court of Indiana decide the case upon the merits upon the basis of the evidence submitted at such first hearing?*

3. Does the due process of law clause of the Fourteenth Amendment require a *further* hearing for the opportunity to submit *additional* evidence in a trial court after the Supreme Court of a state has ruled upon the merits of a claim of unconstitutionality, which ruling was *at the specific request* of the party asserting such claim of unconstitutionality of a statute upon an appeal from the granting of a temporary injunction restraining its enforcement?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to that clause of the 14th Amendment to the Constitution of the United States which appears in the Petition under this heading, the following statutes of Indiana, or parts thereof, may be considered to be involved and are set forth herein verbatim as follows:

Burns IND. STAT. ANN., Vol. 2, Part 2 (1946 Replacement) Sec. 3-2102 at page 1012 of Burns IND. STAT. ANN., *supra:*

> "When it appears by the complaint that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce great injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual; or when such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment,—an injunction may be granted to restrain such act or proceedings until the further order of the court; which may, afterward, be modified upon motion. And when it appears in the complaint at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property. [Acts 1881 (Spec. Sess.), ch. 38, § 178, p. 140.]"

Sec. 3-2103 at page 1018 of Burns IND. STAT. ANN., *supra*:

> "In all applications for an injunction, the complaint, or so much thereof as pertains to the acts or proceedings to be enjoined, shall be verified by affidavit. The injunction may be granted at the time of commencing the action, or at any time afterward

before judgment in that proceeding. [Acts 1881 (Spec. Sess.), ch. 38, § 179, p. 240.]"

Sec. 3-2104 at page 1018 of Burns IND. STAT. ANN., *supra*:

> "No injunction shall be granted until it shall appear to the court or judge granting it that some one or more of the opposite parties concerned has had reasonable notice of the time and place of making the application, except that in cases of emergency, to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing thereon. [Acts 1881 (Spec. Sess.), ch. 38, § 180, p. 240.]"

Sec. 3-2105 at page 1019 of Burns IND. STAT. ANN., *supra*:

> "On the hearing of an application for a restraining order or temporary injunction, each party may read affidavits or documentary or record evidence. [Acts 1881 (Spec. Sess.), ch. 38, § 181, p. 240.]"

STATEMENT

Petitioners commenced their action in the Superior Court of Marion County, Indiana, Room No. 3 on May 13, 1964. The hearing on the temporary injunction was held on September 23, 1964, at which time the great bulk of the seven (7) volume, thirteen hundred (1300) page transcript of evidence was introduced and submitted to said trial court. On said date, a total of forty-six (46) exhaustive, detailed and technical affidavits or exhibits were submitted by Petitioners allegedly in support of all of the claims made by them in their complaint, together with a copy of

Public Law 88-108 and defendants on said date submitted a total of ten (10) affidavits or exhibits, all of which were subject to the right of any of the parties to object to the admissibility thereof.

At the September 23, 1964 hearing, the trial court granted all parties twenty-one (21) days within which to make or file objections to evidence already submitted and within which to introduce rebuttal evidence.

On October 14, 1964, Respondents filed written objections to certain of the Petitioners' evidence and also on said date the Petitioners introduced into evidence eight (8) rebuttal affidavits or exhibits and the Respondents introduced into evidence five (5) rebuttal affidavits or exhibits.

The subject matter of this mass of documentary evidence was as broad in scope as the issues raised by the Petitioners' Complaint and concerned not simply the then unresolved issue of federal pre-emption, which was finally decided by this Honorable Court on January 31, 1966 in *Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co.*, 382 U.S. 423. Such evidence also covered the issues presented with respect to the present fact pattern of the operation of the railroad industry and dealt in detail with the various functions of the crew members of a train crew, the technological advances which had occurred in railroad equipment since the enactment of Indiana's so-called Full Crew Law (Indiana Acts 1937, ch. 58, Burns IND. STAT. ANN., §§ 55-1326 to 55-1338) and evidence of the additional amount of money required to be expended by the Petitioners to comply with said Indiana law.

This mass of evidence having been before the trial court since October 14, 1964, said court on February 3, 1965

halted the enforcement of the 1937 Indiana Full Crew Statute and made the following Entry:

"The Court, being duly advised now:

1. Overrules the demurrer to the plaintiffs' amended complaint filed by the defendants on June 19, 1964, and rules the defendants and intervening defendants to answer on or before February 16, 1965.

2. Overrules all objections both oral and written made in this cause, including those made at the hearing on the application for a temporary injunction and within 21 days thereafter, as to any of the affidavits, exhibits, the verified amended complaint and all other evidence offered respecting the issuance of a temporary injunction.

3. Orders admitted and read into evidence all of the affidavits, exhibits, the verified amended complaint and its exhibits, and all other evidence offered by the plaintiffs, the defendants and the defendant intervenors at the hearing on plaintiffs' application for a temporary injunction, being Plaintiffs' Exhibits A and B-1 through R, inclusive, Defendants' Exhibits 1 and 2, and Defendant Intervenors' Exhibits 1 through 8, inclusive.

4. Orders admitted and read into evidence all of the affidavits, exhibits, and all other evidence offered by the plaintiffs, the defendants, and the defendant intervenors within 21 days after the hearing on plaintiffs' application for a temporary injunction, being Plaintiffs' Rebuttal Exhibits A through H, inclusive, and the Defendants' Rebuttal Exhibits 1 through 5, inclusive.

5. Takes judicial notice of the statutes set forth in Plaintiffs' Notice of Intention to Request the Taking of Judicial Notice filed in this cause on June 19, 1964.

6. Takes judicial notice of the matters set forth in defendant intervenors Request for Court to Take Judicial Notice filed in this cause on October 14, 1964.

Temporary injunction granted. Bond fixed at $5,000.00. Undertaking approved and filed. Send cards."

REASONS FOR NOT GRANTING THE WRIT

Summary of Argument

I

Petitioners' due process question is insubstantial, in that they have chosen not to challenge the correctness of the Indiana Supreme Court decision upon the merits of the substantive constitutional questions raised and which were (as admitted by the Petition, p. 3) finally determined by the Indiana Supreme Court, which decision was "subject to review by this Court."

II

Petitioners' due process question is insubstantial, in that they have not shown or alleged that there is any evidence in addition to that submitted by them at the first hearing which is unlike such previously submitted evidence or that there is any newly discovered evidence (not available or known to Petitioners at the time of the first hearing) which would require a different conclusion upon the merits of their claims.

III

Although the Petitioners' Petition for Rehearing filed with the Indiana Supreme Court asserted (Petition p. 30a):

"In ignoring the virtually *uncontradicted evidence revealed by the record* respecting the mechanical and electronic revolution occurring in modern railroading, . . .", Petitioners now claim that they were denied any trial at which to submit evidence. (Our Emphasis)

IV

Instead of ignoring the evidence in the record, in reaching its final decision the Indiana Supreme Court took cognizance of, and accepted at face value the evidence submitted by Petitioners and made it plain in its opinion (Petition p. 9a) that it had not ignored such evidence.

V

As admitted on page 13 of the Petition, Petitioners urged the Indiana Supreme Court to make final disposition of this case on the merits by stating in their brief:

> ". . . Because of the importance of the issues presented, this Court should determine the *constitutionality* of this law *now* as it has done in other cases involving the appeal of a temporary injunction." (Our Emphasis)

Contrary to Petitioners' claim at the bottom of page 13 of their Petition, the above request was not limited to the federal pre-emption question but extended to the overall question of the constitutionality of the Indiana Full Crew Law upon the "issues presented." Petitioners may not invite error and then complain of it. (Our Emphasis)

VI

By reason of the fact that the trial court had on February 3, 1965 halted the enforcement of the 1937 Indiana Full

Crew Law without a finding that its action was based solely upon the Petitioners' claim of federal pre-emption, thereby, for practical purposes, having overruled this Honorable Court's decisions in cases such as that of *Missouri Pacific Railway Co. v. Norwood* (1931), 283 U.S. 249 and in other similar cases, the Indiana Supreme Court was justified in assuming that the trial court had found the Indiana Full Crew Law to be unconstitutional upon all of the bases urged by the Petitioners in their complaint.

ARGUMENT

I

It is particularly noteworthy that the challenge of the Petitioners to the May 19, 1966 decision and opinion of the Indiana Supreme Court is directed only to the very narrow asserted claim that said decision and opinion has deprived them of the opportunity to submit more evidence in addition to that already in the seven (7) volume, thirteen hundred (1300) page transcript now on file with this Honorable Court. Obviously, if the only issue and evidence to be considered by the Indiana Supreme Court related solely to the federal pre-emption question, there would have been no reason to have incumbered the transcript with such a mass of evidence relating to all of the bases for asserted unconstitutionality of the Indiana Full Crew Law as claimed in Petitioners' complaint.

Although the Petitioners on page 3 of their Petition state that it is unquestionable that a final judgment subject to review by this Honorable Court has been entered, nevertheless they have not challenged the correctness of the Indiana Supreme Court decision upon the merits of the substantive constitutional questions raised by them. This is some indication of the insubstantial character of the due process question and that Petitioners' tactics are those of further delay and of securing more time at a second hearing in the trial court at which they can add further evidence to the massive transcript already in existence in this case, so as to have a better factual record to support their claims for later submission to the Indiana Supreme Court and possibly to this Honorable Court.

Although the last sentence of the Petitioners' Petition on page 15 states that the procedure or action in this case is unprecedented, on the other hand, the very case cited by them on the finality of the judgment is itself some precedent. In *Board of Commissioners, etc. v. Lucas, Treasurer* (1876), 93 U.S. 108, the Circuit Court of Tippecanoe County, Indiana had granted a temporary injunction as prayed in a verified complaint, the granting of which was appealed to the Indiana Supreme Court which reversed the lower court and remanded the cause to that court with instructions to dismiss the complaint. On pages 113 and 114 of 93 U.S., this Honorable Court speaking through Mr. Justice Field stated:

> "It is objected, *in limine,* that this court has no jurisdiction of the cause, on the alleged ground that the judgment rendered is not a final judgment. The order of the Circuit Court, granting a preliminary injunction, was, it is true, interlocutory, and, if the judgment of the Supreme Court of the State had been limited to a simple reversal, the objection would have been tenable. The cause would then have remained in the Circuit Court for further proceedings. But the direction to that court, accompanying the reversal of its order to dismiss the complaint, made a final disposition of the cause. With the entry of that judgment the cause was at an end. With the peculiarities of the practice of the Indiana courts we have nothing to do. *If, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that State, it is no concern of ours.* If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, subject in a proper case to our review, whatever may be its technical designation. The course adopted in this

> case was evidently pursued, from the fact that the whole merits of the controversy had been considered on the motion for the preliminary injunction. The application was founded upon the alleged invalidity of the act of 1872; no other matter was discussed, and all objections of form in the proceeding were waived, that the validity of the act might be considered and determined. Being determined against the view advanced by the plaintiffs, the cause, so far as the State courts were concerned, was practically at an end. . . ." (Our Emphasis)

Petitioners' situation is wholly unlike the case relied upon by them, i.e., *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930); in that case, because the state court had overruled a consistent line of procedural decisions with the retroactive effect of denying the litigant a hearing in that case because it was then "too late for the plaintiff to avail itself of the newly found remedy," this Honorable Court held that such state court action deprived the litigant of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." On the other hand, in the present Petitioners' case, they have had a hearing and introduced evidence. Moreover, there is no statute of limitations involved, so that facts not established in the present record and the changes in the railroad industry still occurring which would require a different result in the decision by the Supreme Court of Indiana could always be pleaded to constitute the basis for a subsequent cause of action.

II

It is fundamental that an alleged error in judicial proceedings is not the basis upon which to reverse a decision of an inferior court unless the complainant shows that it

has been prejudiced by such alleged error. In neither their Petition for Rehearing filed with the Indiana Supreme Court, nor in their Petition for a Writ of Certiorari filed with this Honorable Court do Petitioners show or even allege in what manner additional evidence will operate to result in a different decision.

Furthermore, in both their Petition for Rehearing filed with the Indiana Supreme Court and their Petition filed with this Honorable Court, the Petitioners have failed to show or allege what additional evidence or proof of facts can be made by them at a second hearing, which evidence or proof has not already been submitted or made at the first hearing and which would require a different conclusion upon the merits of their claim.

III

The Petitioners by the allegations of their Petition for Rehearing and those in their Petition filed with this Honorable Court have contradicted themselves. By the latter Petition, the Petitioners are claiming that the issues require the development of factual proofs (impliedly not yet proven) regarding the nature and extent of the changed circumstances achieved through technological developments of modern railroading since the enactment of the 1937 Indiana Full Crew Law. However, the seven (7) volume transcript of evidence already adduced is in large part devoted to evidence submitted by the Petitioners in their effort to prove the very developments and changes upon which their complaint was based in part. However, their Petition for Rehearing filed with the Indiana Supreme Court was upon the basis that the court had ignored "the virtually uncontradicted evidence revealed by the record"

(Petition p. 30a) on this very claim of changes occurring in modern railroading since the enactment of the 1937 Indiana Full Crew Law. They know of the vast amount of evidence submitted and cannot now conscientiously assert that they had no opportunity to submit evidence on such basis, nor that the Indiana Supreme Court's decision was based upon a record devoid of evidence on such basis.

IV

Petitioners unfairly accuse the Indiana Supreme Court of having ignored their evidence of changed circumstances and state on page 10 of their Petition:

> ". . . When a litigant asserts that changed circumstances since the passage of a statute have rendered its continued enforcement against him unconstitutional, the state courts are obliged to consider the evidence bearing on those circumstances. *Nashville, C. & St. L. Ry. v. Walters,* 294 U.S. 405 (1935). If due process was denied in *Walters,* when evidence of changed circumstances was ignored, then surely due process has been denied to the Petitioners by the denial of the very trial at which they would adduce their evidence of changed circumstances."

That the *Walters* case, *supra,* is inapplicable to the Petitioners' case is seen by a comparison between what the Supreme Court of Tennessee did and said in the former case with what the Supreme Court of Indiana did and said in the instant case. In the *Walters* case, *supra,* at page 414 and 415 of 294 U.S. (1935), Mr. Justice Brandeis stated:

> ". . . The Supreme Court *declined to consider* the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question

> whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; *and that the Court could not* 'any more' *consider* 'whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions,' than it 'could consider changed mental attitudes to determine the constitutionality and enforceability of a statute. . . .'" (Our Emphasis)

By contrast, the Indiana Supreme Court did not "ignore" the evidence of changed circumstances. Instead, the Indiana Court both considered and accepted the Petitioners' evidence in the most favorable light possible and made it clear that it had done so by stating in its opinion (Petition p. 11a, last paragraph) as follows:

> "In arriving at a determination of the issues involved in the case at bar *we take cognizance of, and accept at face value, the appellees statements that they have made great technological advancements and that the evidence revealed that these operating changes in railroading were occurring in Indiana all during the period between 1937 and the date suit was filed in the instant case and that these changes are still occurring. . . .*" (Our Emphasis)

Although the Petitioners' criticism of the decision and opinion by the Indiana Supreme Court is characterized by them as being upon the basis that it was essential "to vindicate their federal constitutional rights that the fullest possible evidentiary record be assembled, tested by cross-examination," (Petition pp. 10, 11), one may ponder what

the application of such a standard might produce in this case and when the "fullest *possible* evidentiary record" would ever be completely assembled to the extent that no more evidence could be added thereto. Also, Petitioners do not explain why they would need to cross-examine their own witnesses or how they could strengthen their case, which must stand on its own merits and not on the weakness of the Respondents' opposition.

Although characterized by Petitioners' counsel as being a decision which the Indiana Supreme Court could not make because that court had ignored the facts or because it was not based upon the fullest possible development of facts, it would seem that in reality it is the legal conclusions which the Indiana Supreme Court reached, upon the basis of the facts presented to it, of which conclusions the Petitioners should have complained, since the decision of the court is admittedly a final judgment. *However, Petitioners have not questioned such legal conclusions and have now waived the right to do so.*

V

This is not a situation in which on the date of the filing of the complaint (May 13, 1964) the Petitioners hastily submitted a minimum amount of preliminary evidence so as to entitle them to immediate emergency relief. They made no such presentation of evidence at that time. Instead, the hearing was not held until September 23, 1964, thus affording Petitioners considerable time after the filing within which to prepare their case. The extent of their preparation may be seen merely by a glance at the seven (7) volumes of evidence, consisting of some thirteen hundred (1300) pages, most of which was submitted by Petitioners. That the trial court accorded the Petitioners due

process is further attested by the fact that the parties were given twenty-one (21) days after the September 23, 1964 hearing within which to make or file objections to evidence already submitted and within which time to introduce rebuttal evidence. Such objections and evidence were presented to the trial court on October 14, 1964.

Having gained the advantage of a temporary injunction on February 3, 1965, the Petitioners then felt confident of the sufficiency of the record which had been made in the trial court and, as admitted on page 13 of the Petition, urged the Indiana Supreme Court to determine the constitutionality of the law upon the appeal from the granting of the temporary injunction because of the importance of the issues presented.

This Honorable Court has recognized the power of an appellate court to do this very thing, for in the case of *North Carolina Railroad Company v. Story, et al.*, on page 292 of 268 U.S. Mr. Chief Justice Taft, speaking for the Court, stated:

> ". . . By the ordinary practice in equity as administered in England and this country an appellate court has the power on appeal from a temporary or interlocutory order or decree, to examine the merits of the case if sufficiently shown by the pleadings and the record and upon deciding them in favor of the defendant to dismiss the bill and save both parties the needless expense of further prosecution of the suit. . . ."

Petitioners admit (Petition p. 13) that, although the federal pre-emption question had not then been decided by this Honorable Court, that the Indiana Supreme Court could have made a final determination on that issue because it

involved no development of evidence but was simply a question of law. However, taking into account that the Indiana Supreme Court took cognizance of and accepted at face value the Petitioners' statements and evidence that they had made great technological advancements in railroading since the enactment of the 1937 Indiana Full Crew Law, the other questions of constitutionality raised by the Petitioners, for practical purposes, were basically questions of law.

If a state court cannot, without violating the due process of law clause of the Fourteenth Amendment, at the request of the moving party and upon the basis of affidavits and counter-affidavits, make a final determination, then it may be questioned whether the Summary Judgment Procedure of Federal Courts, provided by Rule 56 of Rules of Civil Procedure, may not also violate the due process of law clause of the Fifth Amendment which provides a comparable protection with respect to the application of federal power. In substance and effect, the decision of the Indiana courts upon Petitioners' claims of unconstitutionality were substantially similar to a ruling on a Motion for a Summary Judgment.

Moreover, Petitioners are now asserting that the Indiana Supreme Court erred in having done the very thing requested of it by them, making a decision of the case upon the merits. Simply stated, counsel may not invite error and then complain of it. *Capella, et al. v. Zurich General Acc. Liability Insurance Co., et al.* (1952), 194 F. 2nd 558.

VI

This is not a situation in which the review of a newly enacted statute was involved, which either had not yet gone

into effect or had just recently become operative. It is significant that as of February 3, 1964, the date upon which the trial court issued its temporary injunction, the Indiana Full Crew Law under attack had been in effect in the State of Indiana for a period of twenty-seven years. Moreover, legislation believed to be substantially indistinguishable from that here involved and legislation of other states quite similar to that of Indiana had been ruled to be constitutional by this Honorable Court in such cases as *Missouri, Pacific Railway Company v. Norwood* (1931), 283 U.S. 249 and other similar cases. Petitioners' attack upon the law and their evidence submitted to the trial court were not upon the single issue of federal pre-emption. The record discloses that other bases of unconstitutionality were urged and the great bulk of the evidence submitted was directed toward the attempt to sustain Petitioners' claims of unconstitutionality upon bases other than the federal pre-emption theory.

Because the exercise of the police power of a state to enact such legislation had long ago been upheld, and since the trial court did not expressly base its action in granting the temporary injunction upon the federal pre-emption question, it is fair to assume that the trial court must have considered evidence on all constitutional issues and thus made its determination upon the merits of the case and the consideration of all the evidence presented by the Petitioners.

Unquestionably the Petitioners intended for this evidence to be considered by the trial court in determining the merits of the case at that time, for if their intention was simply to obtain a temporary injunction on the theory that Public Law 88-108 had pre-empted the state law, they would not

have felt it necessary to have produced the voluminous record made in the trial court upon the other constitutional claims made by them. Thus, the Indiana Supreme Court was justified in assuming that the trial court had based its action in granting the temporary injunction upon all of the claims of unconstitutionality, since the lower court did not limit its action to the single basis of claimed federal pre-emption.

CONCLUSION

This case is not like that of *Chicago, Rock Island and Pacific Railroad Co. v. Hardin* (1965), 239 F. Supp. 1, wherein the three-judge federal court based its decision upon the single issue of federal pre-emption, which decision was reversed by this Honorable Court on January 31, 1966 in *Brotherhood of Locomotive Engineers v. Chicago, R. I. & P. R. Co.*, 382 U.S. 423. Instead, because this Honorable Court had decided the federal pre-emption question prior to the issuance of the May 19, 1966 opinion of the Indiana Supreme Court, said state court, because of the evidence presented and at the request of the Petitioners, felt justified in determining the other issues of constitutionality of the Indiana Statute on the merits.

The Respondents believe that there is no substantial basis upon which to remand this case to the Indiana Supreme Court and the trial court either to decide the constitutional issues raised or to accord the Petitioners more time and further opportunity in which to submit additional evidence on the merits. Since Petitioners have waived their right to now contest the legal conclusions reached by the Indiana Supreme Court upon the record made by them, it would seem to the Respondents that the narrow question

relating to their claimed right to a further hearing can only be considered to be insubstantial under the circumstances.

WHEREFORE, for each of the foregoing reasons, it is respectfully submitted that the "Petition for Writ of Certiorari to the Supreme Court of Indiana" should be denied.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1966

No. 390

THE NEW YORK CENTRAL RAILROAD COMPANY, *et al.*,
Petitioners,

—v.—

PUBLIC SERVICE COMMISSION OF INDIANA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition seeks to make two principal points. First, that the Indiana Supreme Court treated as proved Petitioners' allegations as to the technological developments in railroading since the enactment of the Indiana Full Crew Law, and that, accordingly, Petitioners were not injured by being deprived of a hearing on the merits (Br. in Op. 15-17); and, secondly, that even though the Indiana Supreme Court retroactively converted the proceedings on the temporary injunction into a final trial on a permanent injunction, Petitioners were not hurt because there was a bulky record made in connection with the proceedings on the temporary injunction. (Br. in Op. 13-15, 17-21)

Respondents do not, of course, deny that the Indiana Supreme Court retroactively converted the temporary in-

junction proceedings into a final hearing, nor do they deny the fact that under state law this action was without substantial precedent and, accordingly, that Petitioners had no notice of it.

We will reply in turn to the two main points made by Respondents.

1. The Indiana Supreme Court obviously did not, in connection with its decision on the merits, consider as proved the facts alleged by Petitioners with respect to the technological developments in modern railroading—so important on the question of unreasonable burden on interstate commerce and on the substantive Due Process and Equal Protection questions. The passage of the Court's opinion holding the state Full Crew Law constitutional appears at Pet. App. 9a-10a. The dispositive paragraph is the first paragraph on page 10a, and no indication is made that the court is considering the alleged changes in railroading technology in reaching its decision.

The passage relied on so much by Respondents to this effect appears at Pet. App. 11a, in the midst of a discussion of the principles which govern the grant of a temporary injunction—reversal of the Superior Court's grant of which is separately dealt with in the Supreme Court's opinion. (Pet. App. 10a-13a) The discussion is obviously pointed simply to the equities of the grant of a temporary injunction. While the technological improvements are admitted *arguendo* by the court, the court's response is that the changes were only made to meet competition, and that there has not been, it says, improved service to the public by reason thereof. (Pet. App. 12a) —But this reasoning obviously has nothing to do with the merits of the case; the court's discussion of these matters could only relate to the

equities of the grant of the temporary injunction.[1] Apparently at this point it was stating that the fact that the railroads had introduced modern developments did not create an equity justifying the temporary order.

In this connection, the attempt of Respondents (Br. in Op. 15-17) to distinguish what the Indiana Supreme Court did from what this Court condemned in *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U.S. 405 (1935), simply demonstrates that this case is entirely similar to *Walters.* As the passage quoted from that opinion by Respondents itself demonstrates (Br. in Op. 15-16), in *Walters,* the lower court, in the practice condemned, "held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority [to pass it] . . . and that the Court could not 'any more' consider 'whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions,' than it 'could consider changed mental attitudes to determine the constitutionality and enforceability of a statute.' . . . " 294 U.S., at 414-15. But here, the Indiana Supreme Court did exactly the same thing. It simply reasoned that the fact that the 1907 Indiana Act, predecessor to the 1937 Full Crew Law, had been upheld as constitutional at an early date, and the fact that the 1937 Act had earlier been upheld at the trial court level, "together with the rule of law that the constitutionality of an act is presumed, until

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[1] The Indiana Supreme Court's opinion appears to be one whose first thrust was simply to reverse the grant of the temporary injunction, on which there has been superimposed in drafting other material reaching the conclusion that the complaint should be dismissed in its entirety.

overthrown by the courts . . . provides cogent reasons to support the act here in controversy." (Pet. App. 10a) —And even if the court's discussion of the improvements in technology is deemed related to the constitutional question, all it said on that score was the following: "In any event, the alleged improvements in technology and operating changes cannot here be used to justify a reduction in appellees work force. Such relief, if justified, is properly found in the legislature and not the courts." (Pet. App. 12a) —But this is simply to say that those changed circumstances and technological improvements are extrinsic matters, irrelevant to constitutional decision. If this is not a clear refusal to consider evidence of changed circumstances, such as was condemned in the *Walters* case, one could hardly be imagined.

In any event, even if the Indiana Supreme Court had been content to try the constitutionality of the Indiana Full Crew Law under the Commerce Clause, the Due Process Clause and the Equal Protection Clause, in 1966 on the basis of a simple acceptance of the allegations of the complaint as to the extensive developments in railroad technology over the past thirty years, this is obviously not a permissible way of adjudicating these Federal constitutional issues. See Pet. 10-11; *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761 (1945); *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U.S. 520, 528 (1959). Development of a full factual record was called for. Even if the Indiana Supreme Court is accustomed to adjudicating constitutional issues in an abstract fashion, this Court, as its decisions teach, clearly does not follow any such practice; and the Indiana Supreme Court's refusal to permit a factual record to be developed stands as a clog upon review of the under-

lying substantive Federal constitutional contentions by this Court.[2]

Indeed, in this respect, the Respondents imply that factual questions as to the effect of technological development on the railroads, and its relation to the reasonableness of manning levels and to safety, are not in serious dispute. —Of course, only if there were no dispute as to the matter, so that the case presented no issues of fact, could the action of the Indiana Supreme Court be justified. *Cf. Hurwitz* v. *Directors Guild of America, Incorporated,* No. 30215, 2d Cir., Slip Opinion, p. 2662, July 14, 1966; *North Carolina R. Co.* v. *Story,* 268 U.S. 288, 292 (1925). —This is an astounding implication. For nothing could be more controversial than the question of the impact of the railroads' technological developments upon manning levels and the question of railroad safety. This was, after all, the issue which generated the threatened rail strike in 1963 (see *Brotherhood of Locomotive Engineers* v. *Baltimore & Ohio R. Co.,* 372 U.S. 284 (1963), which required Congress to pass the compulsory arbitration law (Public Law 88-108, 77 Stat. 132 (1963)), and which provoked bitter dissent among the members of the Arbitration Board created by the Act of Congress after their protracted hearings. See *Award of National Arbitration Board No. 282,* 41 Lab. Arb. 673 (1963). Certainly before the court below undertook to pass definitively on the issues under the Commerce Clause and the Due Process and Equal Protection Clauses, the essential

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[2] Indeed, it is for this very reason that we have not sought to tender the underlying Federal substantive constitutional issues to this Court at this time. We scarcely need add that this does not constitute a waiver of those issues on remand to the state courts should this Court grant our Petition, or on subsequent review by this Court after such a remand. (*Cf.* Br. in Op. 17)

facts as to which are bound up with this controversial subject matter, there should have been a full evidentiary record; and obviously such a record is essential to this Court's ultimate review of the substantive questions.[3]

2. Likewise, the repeated suggestions by Respondents that because a physically bulky record was produced on the temporary injunction proceedings, the Petitioners were not hurt by the retroactive conversion of those proceedings into a trial of the case on the merits,[4] are without substance. In the first place, although the Respondents refer to the record on the temporary injunction proceedings as a "transcript"—as indeed the Indiana procedure styles it—the fact of the matter is that there was no oral hearing at which live witnesses were examined. The "transcript" is simply a record of affidavits and documentary material; not a single witness was examined orally. This meant, of course, that Petitioners could not cross-examine the witnesses whose affidavits or documentary proofs were put in by Respon-

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[3] Whether the full record would "operate to result in a different decision" (Br. in Op. 14) from the Indiana Supreme Court is not dispositive, for that court does not have the last word on the federal constitutional issues.

Respondents suggest (Br. in Op. 11) that Petitioners are simply seeking delay in this matter. Since there is no longer even a limited stay of the Full Crew Law in effect, it is hard to tell what the purpose of any such "delay" would be.

[4] On the merits of the constitutional question caused by this retroactive conversion, Respondents emphasize (Br. in Op. 12) a passage from the opinion of this Court in *Board of Comm'rs* v. *Lucas*, 93 U.S. 108 (1876), to the effect that "if, upon an appeal from an interlocutory order, a final disposition of the merits of a cause can be made in that State, it is no concern of ours." But in the context, this remark was obviously directed to the question whether the Court had before it a final judgment, jurisdictionally prerequisite to its decision of the case; the remark was not directed

dents.[5] Moreover, as far as Petitioners' own proofs were concerned, they were in general taken from the documentary materials which had been generated by the national dispute over train-crew manning questions which culminated in the threatened railroad strike of 1963, and the passage of Public Law 88-108, and from the materials produced incident to the arbitration under Public Law 88-108.[6] These materials were not so much pointed at the situation in Indiana, or to interstate moves through Indiana, specifically as they were to national issues of technological development, manning levels, and safety. They were thought an adequate presentation for purposes of the temporary injunction; and, indeed, the Superior Court granted a temporary injunction on them. But the retroactive action of

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to the constitutionality of the practice. The same is true of *North Carolina R. Co.* v. *Story, supra,* at 292, quoted at Br. in Op. 18. In neither case was there any issue of fact remaining to be tried.

[5] Respondents suggest that Petitioners would not have cross-examined their own witnesses (Br. in Op. 17), but the point is that Petitioners were foreclosed from an opportunity to cross-examine Respondents' affiants, and that this was done retroactively.

[6] Despite the suggestion of Respondents (Br. in Op. 11, 20-21), we have never claimed that the record before the trial court on the temporary injunction proceedings was limited *solely* to the preemption issue. The point is, rather, that the written material which was submitted then was, to the extent that it was not pointed at the preemption issue, material which had been generated by the national controversy which erupted in 1963. This material was not intended by Petitioners to be a final submission on the question whether the Indiana statute conflicts with the Federal Constitution by imposing an unconstitutional burden on interstate commerce, or by violating the Due Process or Equal Protection Clauses. Our contention is simply that there should be a remand in this case to the Indiana trial court for the making of a full record on these issues, just as this Court ordered a remand to the three-judge Federal District Court in *Brotherhood of Locomotive Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423 (1966), for the making of a record on the corresponding issues raised by the Arkansas "crew consist" legislation.

the State Supreme Court foreclosed the making of a more particularized record, tested by cross-examination, and pointed at the situation in Indiana, such as would justify a permanent injunction—from that court or this Court—holding the Indiana Law unconstitutional.

CONCLUSION

For the reasons stated in the Petition for a Writ of Certiorari and in this Reply Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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